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IN THE
Supreme Court of the United States
October Term, 1987

VINCENT C. LOMBARDI, *et al.*,
Petitioners,

v.

DOW CHEMICAL CO., *et al.*,
Respondents.

In re "Agent Orange" Product Liability Litigation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. CAN A PRIVATE SUPPLIER WHICH CONTRACTS WITH THE GOVERNMENT TO MANUFACTURE A PRODUCT FOR MILITARY USE BE IMMUNE FROM TRADITIONAL TORT LIABILITY, AND, IS SUCH IMMUNITY GROUNDED IN LAW AND PUBLIC POLICY?

II. IF MILITARY SUPPLIERS CAN BE IMMUNE FROM TRADITIONAL TORT LIABILITY UNDER THE MILITARY CONTRACTOR DEFENSE, WHAT STANDARD SHOULD GOVERN THE DEFENSE?

III. IN LIGHT OF THE CONFLICT IN THE CIRCUIT COURTS REGARDING THE PROPER STANDARD FOR THE MILITARY CONTRACTOR DEFENSE, AND IN LIGHT OF THE UNIQUELY FEDERAL NATURE OF THE DEFENSE, SHOULD THIS COURT ESTABLISH A UNIFORM BODY OF FEDERAL COMMON LAW TO GOVERN THE DEFENSE?

IV. DID THE SECOND CIRCUIT'S DEVIATION FROM THE INTENDED MEANING OF *CELOTEX CORP. v. CATRETT*, WHEN IT AFFIRMED SUMMARY JUDGMENT WITHOUT DETERMINING WHETHER RESPONDENTS MET THEIR BURDEN OF PRODUCTION AND WITHOUT CITING TO THE RECORD, REPRESENT SUCH A CLEAR DEPARTURE FROM THE USUAL COURSE OF PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

LIST OF PARTIES

The parties to the proceedings below were 292 plaintiffs who opted out of the Agent Orange class action suit. Sixteen complaints, containing these 292 plaintiffs, were the subject of the appeal to the Second Circuit. These plaintiffs are listed with the corresponding complaint in the Single Appendix at 786a.

The Respondents before this Court include Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T H Agriculture and Nutrition Company, Inc., Thompson Chemicals Corporation and Uniroyal, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Vincent C. Lombardi and those other persons who opted out of the Agent Orange class action, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on April 21, 1987.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) in the case *In re "Agent Orange" Product Liability Litigation* is

reported at 611 F.Supp. 1223 and is reprinted in the Single Appendix submitted with this petition at p. 492a.

The decision of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) in the case of *In re "Agent Orange" Product Liability Litigation (Lilley v. Dow Chemical Co.)* is reported at 611 F.Supp. 1267 and is reprinted in the Single Appendix submitted with this petition at p. 580a.

The opinion for the United States Court of Appeals for the Second Circuit is reported at 818 F.2d 187 and is reprinted in the Single Appendix submitted with this petition at p. 752a.

The Order of the Court of Appeals for the Second Circuit denying plaintiffs' petition for rehearing was issued on June 3, 1987 and is reprinted in the Single Appendix submitted with this petition at p. 777a.

The Orders of the Court of Appeals staying issuance of the mandate pending a petition for a writ of certiorari are printed in the Single Appendix submitted with this petition at p. 780a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The decision of the court below was issued on April 21, 1987. A timely Petition for Rehearing *En Banc* was filed, and was denied on June 3, 1987. On July 17, 1987 the Court of Appeals stayed the issuance of the mandate until August 7, on the condition that a petition for writ of certiorari be filed on or before that date. On August 7, the Court of Appeals continued the stay of the issuance of the mandate until such time as the United States Supreme Court rules on the petition for certiorari.

STATUTES AND RULES

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

This extraordinary piece of litigation began with a single lawsuit filed by Paul Reutershan, deceased, in July of 1978 in the Supreme Court of the State of New York. Over the course of the early stages of the litigation, the Reutershan case was removed to federal court and amended to include class action allegations. Subsequent similar class claims were filed in late 1978 and early 1979. The complaints were filed by Vietnam veterans, their spouses and children and estates of deceased veterans against the several chemical companies who manufactured Agent Orange for the military's use in Vietnam. Those veterans sought compensation for the injuries they allegedly received as a result of exposure to Agent Orange, a herbicide used to defoliate the Vietnam jungles. The toxic effects of Agent Orange

are linked to the presence of dioxin, which is an impure byproduct resulting from the manufacturing process. Dioxin is one of the most toxic chemicals to known humankind.

In May of 1979, the several Agent Orange cases already filed were transferred through the Judicial Panel on Multidistrict Litigation to the Eastern District of New York. The panel established *In re "Agent Orange" Product Liability Litigation*, MDL No. 381, and assigned the cases to District Judge Pratt. On December 29, 1980, Judge Pratt conditionally certified the class action. *In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762, 791 (E.D.N.Y.), *rev'd on other grounds,* 635 F.2d 987 (2d Cir. 1980). Chief District Judge Weinstein formally certified the class action on December 16, 1983. *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *mandamus denied sub nom., In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858 (2d Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1417 (1984).

In 1980 the defendants moved for summary judgment for the first time on the basis of the military contractor defense.[1] Judge Pratt denied the motion on the ground that the defendants' contract performance and relationship with the government raised issues of fact requiring a trial. 506 F.Supp. at 796. Judge Pratt further determined that the military contractor defense would be the first of "serial trials" on common issues in the class action. *Id.* at 785, 796.

After eleven months of intensive discovery, defendants Hercules, Thompson Chemical, Riverdale Chemical, Hoffman-Taft, Dow Chemical, T H Agriculture and

[1] Petitioners use the term "military contractor defense" as adopted by the Second and Eleventh Circuits rather than the more common "government contractor defense."

Hoffman-Taff, Dow Chemical, T H Agriculture and Nutrition, and Uniroyal moved again for summary judgment on the military contractor defense. *In re "Agent Orange" Product Liability Litigation*, 565 F.Supp. 1263 (E.D.N.Y. 1983). Defendants Diamond Shamrock and Monsanto did not join in the motion. Judge Pratt denied the motions of Dow Chemical, T H Agriculture & Nutrition, and Uniroyal "due to the existence of genuine issues of material fact." *Id.* at 1278. In addition, Judge Pratt determined that the military contractor defense should be tried in conjunction with the trial on causation and liability. *Id.* at 1277. The court also granted the motions of Hercules, Thompson Chemical, Riverdale Chemical and Hoffman-Taff, *Id.*, but six months later reinstated Hercules and Thompson Chemical as defendants. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 753 (E.D.N.Y. 1984).

The district court set May 7, 1984 as the trial date. On the day trial was to begin, the class representatives and the seven defendant chemical companies agreed to a settlement of the class claims.[2] By May 6, 1984, the day before settlement, some 2,440 class members had opted out of the class action. Approximately 600 of these opt-outs requested to be reinstated as members of the class by July 1984. Of the remaining opt-outs, approximately 292 are named on complaints which have been transferred to MDL 381 and are the subject of this petition.

[2] The settlement was for $180 million. At first blush this amount appears prodigious. However, considering that the chemical companies stood to lose billions of dollars had the plaintiffs prevailed at trial, this amount is more properly characterized as nuisance value. *See In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145, 151 (2d Cir. 1987). Indeed, if the settlement funds are distributed, permanently disabled veterans will receive a mere $12,000 and families of deceased veterans will receive approximately $5,000.

On July 24, 1984, less than three months after settlement of the Agent Orange class action, the defendant chemical companies moved for summary judgment against the remaining opt-out plaintiffs. The chemical companies argued, among other things, that no plaintiff could prove Agent Orange caused his or her injuries and that the military contractor defense barred the plaintiffs' claims. *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1223 (E.D.N.Y. 1985) (App. p. 492a).

The opt-out plaintiffs' opposition to the defendants' motion addressed both of the above arguments at length. With regard to the military contractor defense, the plaintiffs presented 72 pages of facts and many more documents which categorically demonstrated that the chemical companies not only knew more about the hazards of Agent Orange but also deliberately withheld such informaton from the government. In addition, the government filed under seal an opposition to the defendants' motion setting forth extraordinary facts, including contents of confidential internal memoranda from the chemical companies, which proved that the defendants affirmatively chose not to share knowledge about Agent Orange's hazards with the government.[3]

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[3] For example, plaintiffs and the government appended the following documents to their oppositions:

1. Memo from V.K. Rowe at Dow to Ross Mulholland at Dow in Canada on June 24, 1965. The memo concerned problems with chloracne, one of the common ailments associated with Agent Orange. "This material is exceptionally toxic . . . . I am particularly concerned here with persons who are using the material on a repeated basis . . . . If this should occur, the whole 2,4,5, T industry will be hard hit and I would expect restrictive legislation, either barring the material or putting very rigid controls on it." (J.A. p. 2330).

2. Memo for file on July 9, 1965 from J.P. Frawley at Hercules regarding a telephone call with Earl Farnham at Dow discussing the

The district court granted summary judgment in favor of the defendants against all the opt-outs in two opinions, one for a single opt-out plaintiff and the other for the remainder of the opt-outs. *See In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y. 1985) (App. p. 492a); *In re "Agent Orange" Product Liability Litigation (Lilley v. Dow Chemical Co.),* 611 F.Supp. 1267 (E.D.N.Y. 1985) (App. p. 580a). The *Lilley* opinion involved a single opt-out plaintiff, whose case was treated separately because of the extensive discovery conducted with regard to his particular ailments. The court devoted all but one page of the 40-page opinion for the remainder of the opt-outs to a discussion of causation, stating that lack of causation represented "the most serious deficiency" in the plaintiffs' case. 611 F.Supp. 1223 at 1229 (App. p. 494a). Moreover, in the *Lilley* opinion the court stated that in view of its findings on causation, there was no need to further explore the military contractor defense issue nor any other defenses raised by the chemical companies. 611 F.Supp. 1267 at 1285 (App. p. 620a).

The opt-out plaintiffs appealed the district court's decision. Realizing that because of the complexity of the case

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chloracne problem. ". . . Dow was extremely frightened that the situation might explode. They are aware that their competitors are marketing 2,4,5,-T . . . and if the government learns of this, the whole industry will suffer." (J.A. p. 2332).

3. Memo from V.K. Rowe at Dow to several herbicide manufacturers dated March 19, 1965, with an invitation to come to Dow to discuss problems caused by dioxin. "Our discussions will deal only with the toxicological and analytical aspects of the problem. We will not discuss manufacturing know-how or anything else not dealing with the problem of health." (J.A.p. 2309).

For purposes of this petition, the designation "J.A." refers to the Joint Appendix filed with the appeals at the Second Circuit. The Single Appendix for the three petitions for writ of certiorari filed in the Agent Orange cases is designated as "App."

and the length of the district court's opinion it would be impossible to fully argue all the issues within the allotted page constraints for the appeal brief, the opt-outs filed a motion for extension of the page limit. The circuit court denied the opt-outs' motion. The opt-out plaintiffs, therefore, followed the district court's lead and focused their argument primarily on the courts' causation analysis. They also reiterated their position that genuine issues of material fact existed with regard to the government's knowledge of dioxin hazards and the military contractor defense, and appended numerous documents supporting their position.

On April 21, 1987, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court. *In re "Agent Orange" Product Liability Litigation* 818 F.2d 187 (2d Cir. 1987) (App. p. 752a). Despite the emphasis placed on the causation issue by the parties and the court below, the circuit court did not decide the case on causation grounds. *Id.* at 189 (App. p. 754a). Instead, it inexplicably affirmed the district court's decision solely on the basis of the military contract defense.[4] What is more, the court did not request the parties to fully brief the issue of the military contractor defense.[5] On May 7,

[4] The Second Circuit noted that twenty-eight appellants made no evidentiary submissions on appeal. *Id.* at 189. (App. p. 754a). Those appellants were dismissed on causation as well as military contractor grounds. *Id.* If this court grants certiorari and finds the military contractor defense is not viable, it must then remand to the circuit court for a determination of the reasons for upholding dismissal of these appellants on causation grounds.

[5] The court would not have been inconvenienced by asking the parties to brief the military contractor defense issue. Most of the Agent Orange appeals were argued in April of 1986. However, the court did not hear arguments on the class settlement distribution plan until October. Since the court had to suspend consideration of all matters until October, it could easily have asked the parties to submit additional briefs. *See* 818 F.2d at 148 (App. p. 679a).

1987, the opt-out plaintiffs timely filed a Petition for Rehearing *En Banc,* which the court denied on June 3, 1987 (App. p. 777a).

REASONS FOR GRANTING THE WRIT

1. INTRODUCTION

The Agent Orange product liability litigation is a case unparalleled in American jurisprudence for its size, complexity and temperament. This emotionally charged litigation embodies the inherent tension between pressing social problems and basic legal principles. On the one hand are hundreds of thousands of Vietnam veterans seeking compensation for injuries related to exposure to one of the most toxic chemicals known to humankind. On the other hand is a judiciary forced to wrestle with the veterans' demands against the backdrop of a legal system which is mapping its way through previously unchartered legal territory.

More than money is at stake in this litigation. What is also at stake is the responsibility of the government and military suppliers for injuries which flow from the manufacture of hazardous products during wartime. That both the government and the military suppliers have been cloaked with immunity for their actions has added to the indignity many veterans already feel about their treatment after the Vietnam war. This Court now has the opportunity to examine the propriety of that immunity in the context of one of the most important cases ever brought before the courts.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUIT COURTS, INCLUDING THE SECOND CIRCUIT, REGARDING THE PROPER STANDARD FOR THE MILITARY CONTRACTOR DEFENSE.

In recent years a host of opinions have issued from the circuit courts regarding the military contractor defense. Six circuits have adopted the defense in a variety of forms. The Second Circuit, while not formally adopting a standard to govern the defense, has also cited to it with approval. This Court has not yet addressed the issue of whether a private manufacturer who contracts with the government to produce a product for military use can be immune from liability.

A. The Circuit Courts Have Advanced Several Divergent Tests For The Military Contractor Defense, Creating Confusion And Inconsistent Results In Factually Similar Cases.

The various circuit courts have set forth three distinct tests for the military contractor defense plus one hybrid test. In addition, as discussed in the next section, the Second Circuit's opinion focuses on yet a different test. The most frequently followed version of the defense is the one announced by the Ninth Circuit in *McKay v. Rockwell Int'l. Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied,* 464 U.S. 1043, 104 S.Ct. 711 (1984). The *McKay* court's formulation shields a supplier of military equipment from liability for a design defect where:

(1) the United States is immune from liability . . . ,
(2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment,
(3) the equipment conformed to those specifications, and

(4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

Id. at 451. The Seventh, Fifth and Fourth Circuits adopted the *McKay* test in *Tillett v. J.I. Case Co.*, 756 F.2d 291 (7th Cir. 1985), *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985) and *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *cert. pending. See also Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted,* 107 S.Ct. 872 (1987).

The other major version of the military contractor defense standard was first announced in *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1046 (E.D.N.Y. 1982). In that decision Judge Pratt set forth three factors which a military supplier must establish in order to successfully escape liability:

(1) Proof that the government established contract specifications for the product;
(2) Proof that the contractor complied in all material respects with the specifications; and
(3) Proof that the government knowledge of the hazard was at least equal to that of the contractor.

Id. at 1055. As part of the third element, Judge Pratt imposed a duty on the supplier to inform the government of any known hazards. *Id.* at 1057-58.

The critical difference between the *McKay* and *Agent Orange* tests lies in their approach to the knowledge and approval of specifications elements. With regard to the knowledge element, *McKay* requires that the supplier warn the government of a defect only if the supplier itself knows of that defect. By contrast, the focus of the *Agent Orange*

test is on the level of knowledge which the government possesses regardless of the source of the knowledge. While the supplier still has a duty to warn of known defects, knowledge obtained from sources other than the supplier is considered in determining whether the government's knowledge level is sufficient to absolve the supplier of liability. Both tests erroneously require the supplier to warn only about defects of which the supplier has actual knowledge, rather than about defects of which the supplier reasonably should know.[6]

With regard to the approval of specifications element, the *McKay* test eases the supplier's burden of establishing the degree to which the government must be involved in setting the product specifications. Under *McKay,* mere government approval of a supplier's design shields that supplier from liability. The *Agent Orange* test, in contrast, contains no such provision and requires the supplier to prove that the government affirmatively established the specifications for the allegedly defective product. Thus, the two leading versions of the standard for the military contractor defense vary significantly in the burdens placed on the supplier in order to successfully escape liability.

In *Koutsoubos v. Boeing Vertol,* 755 F.2d 352 (3d Cir.), *cert. denied,* ____ U.S. ____, 106 S.Ct. 72 (1985), the Third Circuit introduced a test which is a hybrid form of the *McKay* and *Agent Orange* standards. It adopted the *Agent Orange* test but modified the first element requiring the government to establish the product specifications as set forth in the *McKay* test. *Id.* 755 F.2d at 355. The court held that where there was a "continuous back-and-forth"

[6] A different test for the military contractor defense propounded by Judge Weinstein in a later Agent Orange decision purportedly cures this omission and is discussed in part B, *infra.*

series of negotiations between the government and the supplier leading to approval of the specifications, government participation was sufficient to meet the Agent Orange test. *Id. Accord In re Air Crash Disaster at Mannheim, Germany,* 769 F.2d 115 (3d Cir. 1985), *cert. denied sub nom., Schoenborn v. Boeing Co.* ____ U.S. ____, 107 S.Ct. 596 (1987).

Not satisfied with any of the above standards, the Eleventh Circuit recently set forth a more narrowly defined test for the military contractor defense. In *Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736 (11th Cir. 1985), *cert. pending,* the court first explained that its central concern in formulating a test was to determine whether the military had actually made a decision to use a product that it knew to be dangerous. *Id.* at 745. Making this determination has been typically problematic since the military itself is never a party to such suits because of immunity and thus could not testify whether it made a decision. *Id.* The court, therefore, reasoned that the supplier was obliged to prove that the product design was not merely the result of the supplier's judgment. *Id.* Accordingly, the court fashioned a test whereby a military contractor would not be held liable for design defects only if it affirmatively proved:

> (1) that it did not participate, or participated only minimally, in the design of those products . . . shown to be defective; *or*
>
> *(2)* that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

Id. at 746. (emphasis in original).

Unlike the *McKay* and *Koutsoubos* tests, the *Shaw* test does not ask the supplier to prove that the government prepared the specifications or that the supplier engaged in "continuous back-and-forth" negotiations such that the government approved the specifications. *Id.* Instead, the *Shaw* test requires the supplier to show that it did not prepare the specifications for the design of the product. *Id.* Only by making such a showing can the supplier affirmatively prove that the product design was not merely the result of the supplier's judgment and thereby claim the defense.

If the supplier cannot prove this first element of the defense, then it must demonstrate that it not only warned the military of the product's hazards but it also informed the military of design alternatives "reasonably known" to the supplier. *Id.* The court determined that a risk or a design alternative is "reasonably known" when it is either actually known or reasonably ought to be known given good design practice in the industry. *Id.* Thus, in *Shaw* the court more properly embraced traditional tort law principles than did the other circuits when it refused to limit the supplier's knowledge of the product's hazards to mere actual knowledge.

B. The Second Circuit's Approval Of A Separate Standard For The Military Contractor Defense Which Has Not Been Adopted By Any Of The Circuits Further Underscores The Need To Resolve The Conflict In The Circuit Courts.

In its decision affirming summary judgment in favor of the defendant chemical companies on the basis of the military contractor defense, the Second Circuit acknowledged two standards for the defense which the district

court had announced in separate opinions. The first of these standards, announced by Judge Pratt in *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. at 1055, and discussed *supra*, has been followed in some of the circuits. A separate, though related, standard was later announced by Judge Weinstein and was intended to be more tailored to the unique circumstances surrounding the Agent Orange controversy. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 848-49 (E.D.N.Y. 1984). Judge Weinstein's standard has not yet been adopted in any of the circuits. Although the Second Circuit below did not formally adopt Judge Weinstein's standard – indeed, it adopted no standard at all – it did cite to the standard with approval. *See* 818 F.2d at 192 (App. p. 760-61a).

Under Judge Weinstein's test, the first two elements as set forth by Judge Pratt remain the same. Thus, the military supplier must prove that the government established the contract specifications and the product met these specifications in all material respects. *Id.* at 192 (App. p. 760a). Judge Weinstein, however, modified the third element as follows:

> A plaintiff would be required to prove, along with the other elements of his cause of action, that the hazards to him that accompanied use of Agent Orange were, or reasonably should have been known, to the defendant. The burden would then shift to each individual defendant to prove (1) that the government knew as much as or more than that defendant knew or reasonably should have known about the dangers of Agent Orange or (2), even if the government had had as much knowledge as that defendant should have had, it would have ordered production of Agent

> Orange in any event and would not have taken steps to reduce or eliminate the hazard.

Id. (App. p. 760-61a).

This standard differs from Judge Pratt's in two ways. First, a military supplier is properly held accountable not only for knowledge of hazards actually known to it, but also for hazards of which it reasonably should have known. This "should have known" language is similar to that employed by the Eleventh Circuit. *See Shaw,* 778 F.2d at 746. Second, the plaintiff under Judge Weinstein's standard has the initial burden of proving that the military supplier knew or should have known of the product's hazards. Only if the plaintiff meets this burden does the burden then shift to the defendant to prove the government's level of knowledge. Judge Weinstein's standard stands alone among those propounded by the various circuit courts in erroneously placing this initial burden of proof on the plaintiff.

By citing with approval a test which has not been adopted in any of the circuits, the Second Circuit has added more confusion to a body of law that is already in conflict. Moreover, the court has further intensified this confusion by not only modifying the elements to the military contractor defense but also by altering which party bears the initial burden of proof. If this confusion and conflict is allowed to persist, future litigants will be helpless to find any guidance from the federal courts of appeals with regard to the military contractor defense.

Besides increasing the confusion surrounding the military contractor defense, the Second Circuit erred when it failed to articulate a precise standard upon which to base its affirmance of the defendants' motion for summary judgment. Such an omission is particularly egregious given the extraordinary nature of the Agent Orange litigation

and the resounding impact a dismissal of action has on the vast number of plaintiffs involved in this case. Accordingly, petitioners respectfully request that this Court grant certiorari to resolve the conflict and confusion surrounding the military contractor defense which exists in the circuit courts and which has only been compounded by the decision of the Second Circuit. The need to resolve the conflict in the circuit courts is demonstrated by this Court's recent decision to grant certiorari in the case of *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted,* 107 S.Ct. 872 (1987).

C. The Uniquely Federal Nature Of The Military Contractor Defense Compels This Court To Establish A Uniform Body Of Law To Govern The Defense.

The federal courts have repeatedly held that diversity suits by servicemen against a military contractor in which government design specifications for military products are at issue give rise to uniquely federal interests which warrant the imposition of federal common law. *Bynum v. FMC Corp.*, 770 F.2d 556, 567-68 (5th Cir. 1985). Indeed, the district court below recognized the distinctively federal nature of the relationship between the government and its military suppliers and, accordingly, applied federal common law as it pertained to the military contractor defense. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 847 (E.D.N.Y. 1985). If the courts are to espouse this need for federal common law to govern the military contractor defense, it is critical that this body of law be uniform.

As petitioners have demonstrated, there currently exist three distinct standards and one hybrid standard for the military contractor defense among the circuit courts. If this present conflict is allowed to continue, the inevitable

result with be conflicting judgments rendered in the various circuits for factually similar cases. Accordingly, petitioners invite this Court to resolve this conflict in the important and uniquely federal issue of military contractor liability by granting certiorari in this case.

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE IMPORTANT QUESTION OF WHETHER LAW AND PUBLIC POLICY SUPPORT THE APPLICATION OF THE MILITARY CONTRACTOR DEFENSE.

A. The Military Contractor Defense Has No Rational Basis In Public Policy Or Law And Therefore Suppliers of Military Products Should Be Held Accountable In Tort For Their Design Defects.

The public policy reasons cited in support of the military contractor defense parallel those supporting the *Feres-Stencel* doctrine. *McKay,* 704 F.2d at 449. Under *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153 (1950), a member of the military is precluded from suing the United States for injuries sustained while on active duty. The United States is also precluded from indemnifying a third party for damages paid to a member of the armed services who is injured during military service. *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 674, 97 S.Ct. 2054, 2059 (1977).

This Court has recently reiterated the three broad rationales underlying the *Feres* decision in *United States v. Johnson,* 55 U.S.L.W. 4647, 4649 (U.S. May 18, 1987). First, the relationship between the government and members of the armed forces is distinctively federal in character. *Id.* Second, generous disability and death benefits are available through the Veterans Benefits Act for service-related injuries. *Id.* Third, suits brought by

service members against the government would thrust the judiciary into sensitive military decisions at the expense of military discipline and effectiveness. *Id.; McKay,* 704 F.2d at 449. This last factor provides the principal justification for the *Feres-Stencel* doctrine, *see United States v. Shearer,* 473 U.S. ____, 105 S.Ct. 52, 58 (1985), and is frequently cited in support of the military contractor defense.

A close examination of the above rationales, however, reveals that they are not relevant to the military contractor defense. The *Feres-Stencel* doctrine is concerned exclusively with government, not contractor, liability. *McKay,* 704 F.2d at 456 (Alarcon, J., dissenting). Indeed, as Judge Pratt in the district court below declared, "to the extent that plaintiffs' complaints seek recovery against the defendant chemical companies, of course, the *Feres* doctrine has no application." 506 F.Supp. at 772.

1. The Existence of Benefits To Veterans Does Not Justify Immunity To Contractors Under The Military Contractor Defense.

Even if the military contractor defense is viewed in light of the *Feres-Stencel* doctrine, public policy does not support viability of the defense. The existence of generous disability and death benefits under the Veterans Benefits Act does not preclude servicemen and their families from being fully compensated for injuries caused by design defects in military products. Although the Act provides "a generous military compensation scheme," *Stencel,* 431 U.S. at 672, 97 S.Ct. at 2058 (1977), it neither implicitly nor explicitly declares that it is the exclusive remedy for a serviceman's injuries. *Id.* at 675, 97 S.Ct. at 2060 (Marshall, J., dissenting).

The veterans' benefits rationale finds no support whatever in the case of Agent Orange. Vietnam veterans expos-

ed to Agent Orange have been consistently denied compensation under the Veterans Benefits Act. In fact, of the 20,000 Agent Orange-related claims filed with the Veterans Administration as of May, 1984, only two claims for liver damage have been granted. 130 Cong. Rec. 56145 (daily ed. May 22, 1984). Therefore, the compensation rationale which underlies the *Feres-Stencel* doctrine and the military contractor defense is simply inapplicable in the instant case.

This Court recently made it very clear in *Johnson,* 55 U.S.L.W. at 4649, that a crucial factor in applying the *Feres-Stencel* doctrine is the availability of compensation to the injured serviceman:

> . . . the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries. In *Feres* the Court observed that the primary purpose of the FTCA was to extend a remedy to those who had been without; if it incidentally benefits those already well provided for, it appears to have been unintentional. 340 U.S. at 140.

Id. In the absence of any such compensation, the *Feres-Stencel* doctrine is simply irrelevant as a justification for the military contractor defense.

2. Neither Military Discipline Nor Military Procurement Would Be Impaired In The Absence Of The Military Contractor Defense.

The Second Circuit below relied on the military discipline rationale and added the additional rationale of safeguarding the process of military procurement to sup-

port its application of the military contractor defense. 818 F.2d at 191 (App. p. 758a), *citing Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986), *cert. pending*. The court below maintained that the judiciary should not involve itself with second-guessing professional military judgments. 818 F.2d at 191 (App. p. 757a). The court also asserted that the process of procuring military goods would be severely impaired if military contractors were exposed to liability for injuries arising from the military's use of their products. *Id.* (App. p. 758a). The court reasoned that the costs would escalate if contractors were exposed to liability. *Id.* (App. p. 758a).

Permitting a serviceman to sue a military contractor, thereby exposing the contractor to tort liability, does not adversely affect military discipline and military decision-making. With regard to military discipline, only two concerns are actually involved: 1) the notion that a soldier might use the civilian courts to challenge an act of a superior officer; and 2) the idea that in a civilian suit involving a serviceman, members of the military may be compelled to testify against each other to the detriment of discipline. *Shaw*, 778 F.2d at 742.

The first concern does not justify the military contractor defense because it is an independent contractor who is being challenged, not a military officer. *Id.* at 742-43. Nor does the second concern justify the military contractor defense. Where the issue is whether a contractor was negligent or produced a defective product, there is simply no need to become involved with conflicting military testimony. This is because it is the design of the product that is being challenged, not the actions of military officers with regard to the product. Even if military officers are required to testify in military contractor suits, the likelihood of any profound disruption of discipline is negligible. *Id.*

at 743. Indeed, the fact that servicemen are barred from suing suppliers of defective military products is more likely to have an adverse effect on military discipline and morale. These servicemen will most certainly feel demoralized when they realize that their private citizen counterparts are more fully compensated for injuries caused under similar circumstances.

Exposing a military contractor to tort liability also does not undermine military decision-making. Decisions regarding the safe design of a military product simply do not involve military judgments. Even when the government provides the specifications for a product, a military contractor typically exercises some discretion over the design of the product, especially with regard to the injury-causing aspects of the product. In the case of Agent Orange, the government's specifications did not provide for the production of dioxin as a byproduct of the manufacturing process. This toxic byproduct was solely the result of each chemical company's choice of a manufacturing process. Some manufacturers, in fact, produced Agent Orange containing much lower concentrations than did other manufacturers. Under such circumstances, holding a contractor liable for any design flaws over which it exercised discretion in no way interferes with military decision-making. *See,* Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Availability?,* 27 Me. L. Rev. 187, 201-02 (1985).

The Second Circuit's concern that the military procurement process would be severely impaired if military contractors were subject to tort liability is also misplaced. The court reasoned that if contractors were held liable for unsafe designs, they would pass the liability costs on to the government. 818 F.2d at 191. (App. p. 758a). However, the court erroneously failed to consider that those contrac-

tors with proven safety records would be able to secure liability insurance at much lower rates than less careful contractors. *McKay,* 704 F.2d at 457 (Alarcon, J., dissenting). Such savings would in turn result in lower, more competitive bids on the part of these contractors. *Id.* Exposing military contractors to tort liability, therefore, provides an incentive for safer product design which in turn lowers the costs to be passed on to the government. Military procurement is thereby enhanced rather than impaired by such a scenario.

In the final analysis, the military contractor defense is not supported by law and public policy. In fact, the defense subverts the very policies it claims to advance. For this reason, petitioners pray that this court abolish the military contractor defense in favor of traditional tort liability.

B. If This Court Chooses To Recognize The Military Contractor Defense It Should Adopt The Test Announced By The Eleventh Circuit In *Shaw v. Grumman Aerospace.*

If this Court finds that the military contractor defense is grounded in law and public policy, petitioners submit that the only proper test is the one propounded by the Eleventh Circuit in *Shaw v. Grumman Aerospace.* The *Shaw* test is the preferred one for two reasons. First, *Shaw* properly places the entire burden on the military supplier to prove that it did not participate or only minimally participated in the design of the product, or, to prove that it warned the military of the design risks and the military nonetheless chose to proceed despite the dangerous design. 778 F.2d at 746. Second, the *Shaw* court properly held that the supplier must notify the military of design risks and design alternatives of which it either actually knows or reasonably should know. *Id.* By using this "should know" lan-

guage, suppliers are not rewarded for knowing as little as possible about their product.

Petitioners further submit that this Court should reject the test propounded by Judge Weinstein in the district court below. Judge Weinstein's test improperly places the initial burden on the plaintiff to prove that a product's hazards were known, or reasonably should have been known, to the defendant. 597 F.Supp. at 849. No circuit court employing any version of the military contractor defense has ever placed such a burden on the plaintiff.

In addition, another element of Judge Weinstein's test is highly speculative and unworkable. This is the element which requires a defendant to prove that even if the government had as much knowledge as the defendant about the product's hazards, the government would nonetheless have ordered production and would not have taken steps to reduce the hazard. *Id.* Asking a jury to speculate what the government *might* have done *if* it knew about a product's hazards is too tenuous and simply unworkable. In the case of Agent Orange, even if the military had used Agent Orange despite knowledge of its hazards, the military might have chosen to use the product in a variety of ways or with certain restrictions. For example, the military might have warned the servicemen of the dangers of Agent Orange, might have provided protective gear to reduce hazards, might have medically monitored servicemen with respect to exposure, or might have warned about drinking local water and eating local food. The possibilities for reducing the hazards of Agent Orange are endless and such speculation is outside the province of a jury.

Accordingly, in the event that this Court adopts the military contractor defense, petitioners submit that the *Shaw* court has propounded the better-reasoned test.

IV. THE SECOND CIRCUIT RADICALLY DEPARTED FROM THE INTENDED MEANING OF THIS COURT'S DECISION IN *CELOTEX CORP. v. CATRETT* WHEN IT AFFIRMED SUMMARY JUDGMENT WITHOUT REQUIRING RESPONDENTS TO MEET THEIR BURDEN OF PRODUCTION AND WITHOUT CITING TO THE EVIDENCE IN THE RECORD.

In *Celotex Corp. v. Catrett,* __ U.S. __, 106 S.Ct. 2548 (1986) this Court attempted to clarify its position regarding the moving party's burden of production in a motion for summary judgment. The decision below, however, goes far beyond this Court's intended meaning in *Catrett* and creates its own ruling with regard to summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure permits summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court has traditionally held that the party who moves for summary judgment has the burden of showing the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). The Catrett* decision addresses the issue of what actions a moving party must take to meet its burden of production for a summary judgment motion.

In *Catrett,* the defendant filed a motion for summary judgment at the conclusion of discovery, arguing that the plaintiff had failed to produce evidence that the defendant's product was the proximate cause of her injuries. 106 S.Ct. at 2551. The defendant produced no documents or affidavits supporting its motion. *Id.* The plaintiff responded with documents which refuted the defendant's contentions. *Id.* The district court granted summary judgment and the court of appeals reversed, ruling that a moving

party was obliged to produce evidence, in the form of affidavits or otherwise, to meet its burden of production. *Id.* at 2551-52.

This Court reversed the court of appeals in a divided decision and held that the moving party is under no obligation to produce supporting affidavits as long as it can make a "showing" that there is an absence of evidence to support the non-moving party's case. *Id.* at 2554. The *Catrett* court also ruled that, pursuant to its ruling in *Adickes,* the moving party still bore the burden of production. *Id.*

Unfortunately, the majority in *Catrett* did not further clarify what is specifically required of the moving party to meet its burden of production. In fact, it injected an element of ambiguity into its ruling by pointing to the lower court's superior knowledge of local law as well as its power to enter summary judgment *sua sponte. Id.* These latter comments give the appearance of allowing the lower courts unbridled discretion to set their own standards for summary judgment. Justice Brennan's dissent, which agreed with the legal analysis of the majority's findings but disagreed with the application to the facts, accurately predicted that the majority's lack of clarity "will very likely create confusion." *Id.* 2556. This prediction has now been played out in the Second Circuit's decision below.

The Second Circuit's decision affirmed summary judgment in favor of the defendant chemical companies on the basis of the military contractor defense, but failed to ever mention whether the defendants met their burden of production. The court compounded this error by failing to critically examine whether the evidence in the record supported both its findings and the district court's findings.

As stated previously, the district court granted summary judgment primarily on the basis of causation. The district

court's 40-page opinion for the opt-outs devoted a scant three paragraphs to the military contractor defense. Moreover, the opinion for the single opt-out plaintiff, John Lilley, affirmatively stated it was not even going to address the military contractor defense. 611 F.Supp. at 1285. In the opinion for the remaining opt-outs, the court merely made the conclusory statement that "the government knew as much as, or more than, the defendant chemical companies about the possible adverse health effects of Agent Orange as it was used in Vietnam." 611 F.Supp. at 1263 (App. p. 573a). The court, however, never described what information supported such a conclusion. Such a conclusory statement is contrary to prior decisions where Judge Weinstein and Judge Pratt had ruled that the level of the government's knowledge was a factual question for the jury. *See* 597 F.Supp. at 797; 565 F.Supp. at 1265-1275. In fact, in his opinion approving the settlement, Judge Weinstein stated that "[t]he plaintiffs' arguments [that the military contractor defense cannot be used to bar their claims] have some force, especially when examined in light of the policies that underlie the defense." 597 F.Supp. at 848. Despite this earlier statement, he later changed his position without explanation and dismissed the opt-out plaintiffs' claims. 611 F.Supp. at 1263 (App. p. 573a). Therefore, the Circuit Court not only failed to cite to the evidence but also relied on an opinion which itself never examined the evidence in the record and which was inexplicably contrary to its own prior decisions.

By not citing to the evidence, the circuit court failed to demonstrate how the defendants met their burden of production for summary judgment with regard to the military contractor defense. While the *Catrett* court acknowledged a lower court's power to exercise discretion in ruling on summary judgment motions, it never intended a trial court of court of appeals to altogether abandon the

standard for the burden of production. The circuit court has gone far beyond this Court's pronouncement in *Catrett* and in doing so has committed error.

The Second Circuit fares no better with its treatment of the issue of causation. While the court stated that it was not basing its decision on causation, 818 F.2d at 189 (App. p. 754a), it nonetheles ruled on the issue under the guise of the "duty to inform." The court held that because no substantial evidence existed linking Agent Orange with the veterans' ailments, the chemical companies had no duty to inform the government of conditions which were not hazardous. *Id.* at 193 (App. p. 763a). In the absence of any duty to inform the government of the hazards of Agent Orange, the chemical companies could successfully claim immunity under the military contractor defense.

Again, the circuit court failed to determine whether the defendants met their burden of production. The court accepted without question the premise that there is insufficient proof of causation despite the evidence presented by plaintiffs raising genuine issues of material fact. Indeed, the court failed to even cite to the evidence submitted by either the plaintiffs or the defendants in this regard.

In addition to ignoring the proper standard for the burden of production, the Second Circuit also erred when it decided this case on grounds not argued before the court. As a result of the district court's emphasis on causation and because of page constraints imposed by the circuit court, the plantiffs focused their argument almost exclusively on the issue of causation. Despite this, the circuit court based its decision solely on the military contractor defense. This action, coupled with the court's failure to cite to the evidence below and failure to determine whether the defendants met their burden of production on summary judgment, amounts to a violation of the plaintiffs'

right of access to the courts and a jury trial under the Fifth Amendment. Petitioners respectfully contend that the Second Circuit's actions represent such a clear departure from the usual course of proceedings as to call for an exercise of this Court's power of supervision.

V. CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Second Circuit.

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